



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 24, 2004

Ms. Paula A. Jones
General Counsel
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

OR2004-2242

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 198228.

The Employees Retirement System of Texas ("ERS") received a request for "all documentation, including correspondence, email or memoranda, directed to ERS or its board, related to participation in the Texas Growth Fund ["TGF"], from its inception to present" and "the total amount of ERS investment in TGF, amount of returns to date, and fees paid." You state that you have released some of the responsive information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. In addition, because you believe the privacy and/or proprietary rights of TGF and those private entities in which TGF invests ("private companies") may be implicated, you notified TGF of the request.¹ TGF responded by arguing that the requested information is excepted pursuant to section 552.104 of the Government Code. TGF also informed us that it provided notice to the private companies on ERS's behalf. Four out of the twenty-three private companies which received notice from TGF under section 552.305 submitted arguments to this office for withholding the requested

¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

information. You have submitted representative samples of the requested information² and identify four responsive categories of information that ERS wishes to protect from disclosure. We have considered all of the asserted exceptions and the submitted comments, and we have reviewed the submitted information.

Initially, you note that some of the information responsive to this request is the identical information that was the subject of a previous ruling from this office. In Open Records Letter No. 2001-2533 (2001), we reviewed a request that ERS received related to ERS investment in the Texas Growth Fund. You indicate that some of the responsive information will be withheld or released in accordance with our previous ruling. Assuming that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that you may rely on our decision in Open Records Letter No. 2001-2533 (2001) with respect to the information requested in this instance that was previously ruled upon in that decision.³ See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001). To the extent that the information requested in this instance was not the subject of that prior ruling, we will address your arguments.

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. See Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general

² We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

³ The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. See Open Records Decision No. 673 (2001).

allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You assert that ERS has specific marketplace interests in the information at issue. You state:

ERS is constitutionally responsible for the administration of the investment of the funds of the system, including investments in the TGF and other investments permitted in accordance with Article XVI, § 67(a)(1) and applicable law. ERS is constitutionally authorized to invest in TGF, and is currently an active participant in TGF.

TGF advises us that TGF is an investment trust created to allow public pension funds and permanent education funds in Texas to invest in the private equity marketplace. On November 8, 1988, Texans voted to approve a constitutional amendment that authorized certain public pension funds and permanent education funds to make private equity investments through a trust established under Article XVI, Section 70 of the Texas Constitution. In December 1991, TGF was established through the execution of a Declaration of Trust executed by the participating public funds. A second Declaration of Trust was established in 1995, and a third in 1998.

Based on these representations, we conclude that ERS and TGF have demonstrated specific marketplace interests and may be considered "competitors" in the private marketplace for purposes of section 552.104. *See* Open Records Decision No. 593 (1991). Thus, ERS and TGF may avail themselves of section 552.104 protection for this information, provided ERS and TGF demonstrate actual or potential harm to their competitive interests if the information at issue was released to the public.

You list several possible ways in which the release of the submitted information would harm ERS's marketplace interests. You state that:

TGF, and ERS through TGF, . . . compete in the private equity marketplace. Such competition requires complete confidentiality in regard to potential investment opportunities to achieve success. The responsive information contains confidential and financial information about the Private Companies as potential investment opportunities. . . . The disclosure of the detailed financial information of the Private Companies which is used to evaluate these Private Companies would completely eliminate the competitive position of TGF and ERS. The main purpose of ERS'[s] and TGF'[s] participation in the private equity marketplace investment is to allow them to capitalize on this confidential information so that they may identify and invest in sound private investment vehicles thereby maximizing the investment returns for ERS and TGF. If this confidential information held by ERS were provided to the entire marketplace, these private investment

vehicles would lose their “private” status, and all of the information that had been gathered, interpreted and evaluated on these Private Companies would become available to any investor. The publication of this confidential information would destroy the competitive advantage gained through diligent efforts and capital expenditure of TGF, and of ERS by virtue of its investment in TGF. . . . To compel the release of this confidential information by ERS would seriously harm the ability of TGF, ERS and other entities utilizing TGF to compete for high-quality private investments.

Based on these representations as well as other arguments contained in your brief and in the brief submitted by TGF, we conclude that ERS and TGF have shown that release of the submitted information at issue will bring about a specific harm to ERS’s and TGF’s marketplace interests. Accordingly, ERS may withhold the information that was not previously ruled upon pursuant to section 552.104 of the Government Code. As our ruling is dispositive, we do not address any of the other claimed exceptions.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 198228

Enc. Submitted documents

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